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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 177

ALICE L. HEATH,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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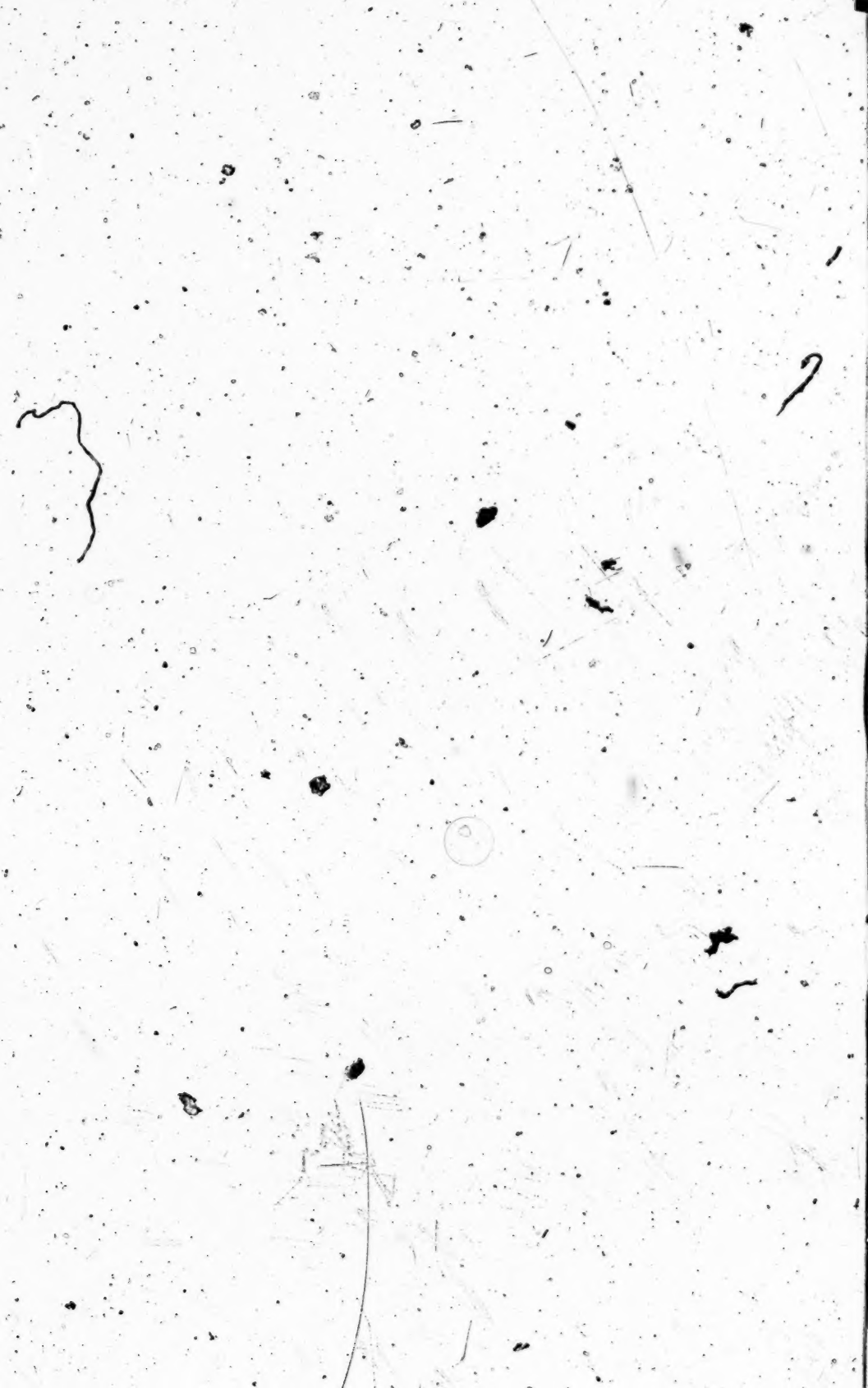

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Second Circuit to review the order and judgment of that court rendered in the above cause.

Jurisdiction

The judgment of the Court of Appeals was entered on April 16, 1959. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

The Opinions of the Courts Below

The opinion of the Tax Court is reported in 30 T. C. No. 31, and is set forth in the petitioner's printed appendix filed herewith (pp. 10a-17a). The opinion of the Circuit Court of Appeals for the Second Circuit is not yet reported, but is set forth in petitioner's printed appendix (p. 19a).

Question Presented

The question involved is whether, as found by the Courts below, the petitioner is subject to Federal income tax on amounts of $11,000. annually paid to her by her former husband under an agreement made in consideration of her relinquishment of the custody of their two children, made after their re-marriage to others, and not incident to their decree of divorce.

Statement

So far as pertinent here, the facts are undisputed.

The petitioner is an individual United States citizen who resided at Newton, Connecticut. Her individual returns for the years 1943, 1944 and 1945, on a calendar year basis and cash method of accounting, were timely filed with the Collector of Internal Revenue for the District of Connecticut.

The petitioner and one Newton were married in August 1917. On July 23, 1924, the petitioner and Newton, then being domiciled in France, in anticipation of divorce, entered into a trust agreement for

the support of the petitioner and their two minor children. Under that agreement Newton conveyed to trustees $400,000. of his capital contribution in a New York partnership with directions to the trustees to pay the annual income of $24,000. to the petitioner until her death or remarriage, and upon her remarriage to pay $14,000. annually to her and $5,000. to each child.

On July 28, 1924, five days after the execution of the trust instrument, the petitioner and Newton were divorced by a decree issued by a French court whose jurisdiction is not questioned. The decree granted custody of the children to the petitioner; it made no reference to the trust agreement, and made no provision for alimony.

The petitioner remarried in 1926.

On May 18, 1928, the petitioner and Newton entered into an agreement therein referred to as the "property agreement" and such agreement will likewise be so referred to herein. At the same time they also entered into a custody agreement. The custody agreement provided that custody of the children should be divided between the petitioner and Newton.

The property agreement provided that Newton should be the guardian of the property of the children and entitled to receive the income which, under the trust agreement of July 23, 1924, was theretofore payable to the petitioner on behalf of the children. In such agreement Newton undertook to pay to the petitioner $6,000. annually for life "in addition to the financial provision made by such indenture on July 23, 1924, for and in behalf of Alice L. Heath,"

conditioned on her faithful performance of the custody agreement. Newton further agreed to pay to the petitioner during the minority of the children the sum of $1,250. annually for the maintenance and support of each child in the period that the petitioner was entitled to their custody, and a further sum of $2,500. each year the children remained during the summer months in the United States at stipulated localities. The property agreement was not to become effective until the contemporaneous custody agreement was approved by the Surrogate's Court of the County of New York. That court approved the custody agreement on May 22, 1928.

On September 22, 1930, the petitioner and Newton entered into two additional agreements, one called "Property Agreement" and the other "Custody Agreement." The property agreement was not to become effective until the custody agreement had been approved by the Surrogate's Court of New York County. The approval of that court was duly obtained and the property agreement became effective.

The 1930 property agreement cancelled the 1928 property agreement, but left the 1924 trust agreement undisturbed. Under the 1930 property agreement Newton was required to pay to the petitioner $11,000. annually in addition to amounts receivable by her under the 1924 trust agreement. The $11,000. annual additional payments were terminable at the option of Newton in the event the petitioner should apply to any court for modification or revocation of the new custody agreement.

Under the 1930 custody agreement Newton became the sole guardian of the persons of the children, and

he was given exclusive custody of them, with visitation rights in the petitioner. The effect of the agreement was to continue Newton as the guardian of the property of the children.

By the end of 1932, the entire corpus of the trust created by Newton in 1924 had been lost and no income from it was available to be paid to the petitioner. In 1937, following litigation between the petitioner and representatives of the original trustees of the 1924 trust, such representatives established a new trust fund from which the petitioner has received payments which she has reported on her income tax returns.

For the years 1943, 1944 and 1945 the petitioner did not include in income the amounts of $11,000. received by her in each of those years from Newton under the property agreement of September 22, 1930. The Commissioner included such amount in the petitioner's income for each year as alimony income.

For the year 1944 Newton brought suit against the Collector of Internal Revenue for the second district of New York for refund of income tax. The question for determination in that case was whether the amount of $11,000. paid by Newton to the petitioner in 1944, pursuant to the property agreement of September 22, 1930, should have been allowed as an item of alimony deductible under Section 23(u) of the Internal Revenue Code of 1939, as defined by Section 22(k) of the Code. The District Court entered judgment for the collector. *Newton* v. *Pedrick*, 115 F. Supp. 368. The Second Circuit Court of Appeals in *Newton* v. *Pedrick*, 212 F. 2d 357, reversed

the District Court and held the payments to be deductible by Newton.

The Tax Court held here that the amount of $11,000. received by the petitioner from Newton in each of the taxable years under the agreement of September 22, 1930, was a payment in discharge of a legal obligation of Newton, which, because of the marital or family relationship, was incurred by him under a written instrument incident to the divorce of the petitioner and Newton. The Second Circuit Court of Appeals affirmed.

Reasons for Granting the Writ

1. The decision below is in conflict with the decisions of the Circuit Court of Appeals for the District of Columbia in *Comm.* v. *Walsh*, 183 F. 2d 803 and of the Third Circuit Court of Appeals in *Cox* v. *Comm.*, 176 F. 2d 226, as well as with an unbroken series of pronouncements, first in Treasury Regulations, next by the Tax Court, then by Courts of Appeals, and finally by the House and Senate Committee Reports on the 1954 Code interpreting the statute to the contrary.

2. The question involved here is important in the administration of Federal income tax law, and is one that has not been, but should be, determined by this Court.

POINT I

The instant case is in conflict with the decisions of the Third Circuit Court of Appeals in *Cox* v. *Comm.* and of the District of Columbia Court of Appeals in *Comm.* v. *Walsh*, as well as with a twelve-year series of pronouncements of Treasury Regulations, the Tax Court, the Courts of Appeals and Congressional Reports.

The decision below follows the 1954 decision of the same Court in *Newton* v. *Pedrick*, 212 F. 357, which reversed the District Court (115 F. S. 368) and held that Mr. Newton, the taxpayer's former husband, was not taxable upon the payments here in question. The Court recognized in that opinion that this was the first time since the enactment of the 1942 Revenue Act that payments under a written instrument concededly not incident to a divorce decree, but found to be incident to the "status of divorce," were held to be excludible from the husband's income. This new test conflicts with a previously unbroken series of interpretations, administrative, legislative and judicial.

In *Cox* v. *Comm.*, *supra*, the Court held that a written agreement made eight months after the divorce was outside the statute, because while it referred to the divorce decree, it was actually "related at most to the divorce status." The Court said "The term 'divorce,' as we use it here, does not refer to status. * * *."

In *Comm.* v. *Walsh*, *supra*, the majority of the Court held that a later written agreement reducing

the decreed alimony deprived the payor of the right to deduct even the reduced payment, because this was made under an agreement which was not incident to the divorce decree. The Court based its decision in part on the interpretation given to the statute by Treasury Regulations.

The *Newton* opinion relied largely on the same court's earlier decision in *Lerner* v. *Comm.*, 195 F. 2d 296 (though the point there was quite different) which referred (at 298) to "the indicated congressional policy of placing the tax burden of all general marriage settlement payments on the party entitled to their enjoyment." There is no doubt that this was one of the purposes of the 1942 amendment. But concentration on this particular purpose seems to have led the court to overlook another most important purpose of the amendment, which ran through the Committee Reports as well as the phrasing of the law itself, and that was to make sure that no deduction could be permitted under any circumstances whatever, without the sanction of a court decree. This latter precaution Congress evidently regarded as the more vital, for while it provided many exceptions to deductibility, there was none as to court sanction.

The particular section of the statute which was in question in *Newton* and *Heath* reads (Title 26 U. S. C. A. 22(k)):

> "In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments * * * received subsequent to such decree in discharge of, or attributable to

property transferred (in trust or otherwise) in discharge of a legal obligation which because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband."

That the words "under a written instrument incident to such divorce" meant "under a written instrument incident to such divorce decree" was at once made crystal clear in Regulations 111 which governed the interpretation and enforcement of the statute. Among others, the following excerpts are self-explanatory (emphasis supplied):

"Regulations 111, §29.22(k)-1(b). Alimony income attributable to property.— * * * As to periodic payments received by a former wife attributable to property in trust in cases to which section 22(k) does not apply because the husband's obligation is not specified *in the decree or an instrument incident thereto*, see section 171(a) and section 29.171-1.

"Section 22(k) does not apply to that part of any periodic payment attributable to that portion of any interest in property transferred in discharge of the

husband's obligation *under the decree or instrument incident thereto*, which interest originally belonged to the wife. In this case, the full amount of that part of the annuity received by the wife in discharge of the husband's obligation *under the decree, or instrument incident thereto*, is taxable to her under section 22(k), while that portion of the annuity attributable to the wife's interest in the securities so transferred is taxable to her only to the extent it is out of trust income, as provided in section 162.

* * * *

"(c) *Alimony installment payments.*—In general, installment payments discharging a part of an obligation the principal sum of which is, in terms of money or property specified *in the decree of divorce or legal separation, or in an instrument incident thereto*, are not considered 'periodic payments' and therefore are not to be included under section 22(k) in the wife's income."

The above quotations from the Regulations speak for themselves, and they were repeated without change in the 1946 Supplement and in Regulations 118. Curiously enough, none of this decisive explanatory wording seems to have been called to the attention of the Court in *Newton* v. *Pedrick*, *supra*, or in any of the prior cases in the Second Circuit referred to therein, as appears from an examination of the briefs in those cases. It is not apparent from the opinion below whether the Court of Appeals overruled *sub silentio* this consistent twelve-year-long administrative interpretation, or whether it was not aware of it when deciding *Newton*, but has now decided not to change its former decision. In neither opinion did the Court

explain its disregard of the Regulations,—a disregard which conflicts with the well-established rule of this Court. It seems beyond dispute that there was at least an ambiguity in the statutory language (p. 14 *et seq. infra*) and one of the functions of Treasury Regulations is to clarify such ambiguities. *Textile Mills Corp.* v. *Comm.*, 314 U. S. 326, 338.

As was said in *Helvering* v. *Winmill*, 305 U. S. 79, 83:

> "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially re-enacted statutes, are deemed to have received congressional approval and have the effect of law."

To the same effect are *United States* v. *Allen-Bradley Co.*, 352 U. S. 306; *National Lead Co.* v. *Comm.*, 352 U. S. 313; *Comm.* v. *Wheeler*, 324 U. S. 542, 547.

In *Comm.* v. *South Texas Lumber Co.*, 333 U. S. 496, 501, the court said:

> "This Court has many times declared that Treasury regulations must be sustained unless unreasonable and plainly inconsistent with the revenue statutes and that they constitute contemporaneous constructions by those charged with administration of these statutes which should not be over-ruled except for weighty reasons."

The unanimous opinion of the Supreme Court in *United States* v. *Leslie Salt Co.*, 350 U. S. 383, 396 quoted with approval Mr. Justice Cardozo's statement in *Norwegian Nitrogen Prod. Co.* v. *United States*,

288 U. S. 294, 315, as follows, which is peculiarly apposite to the Regulation involved here:

> "administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. * * * The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."

The *Leslie Salt Co.* opinion further says (396, 397):

> "Against the Treasurer's prior long-standing and consistent administrative interpretation its more recent *ad hoc* contention as to how the statute should be construed cannot stand. Moreover, that original interpretation has had both express and implied congressional acquiescence through the 1918 amendment to the statute (*supra*, p. 391), which has ever since continued in effect, and through Congress having let the administrative interpretation remain undisturbed for so many years."

The *Newton* decision leaned heavily on the Court's intuition as to the supposed Congressional intention, harking back to its *Lerner* dictum. But this main ground for its holding was dramatically swept away while its decision was still under advisement. For as opposed to the Court's inference from some remarks in the 1942 House Committee Report as to the general purpose of the new statute, which *Lerner* de-

scribed as "such legislative history as is available," the Congressional Reports on the 1954 Code produced a clear statement on the very point at issue in *Newton*, which was exactly contrary to the Court's decision. The *Newton* case was argued *March 11, 1954*, and decided *April 28, 1954*. In considering the amendment by the 1954 Code of the provision in question, the House Committee Report, ordered printed on *March 9, 1954*, stated:

(H. Rep. No. 1337, 83rd Cong., 2d Sess., p. 9):

> "Present law taxes to a recipient and allows the payor a deduction for periodic alimony or separate maintenance payments if the payments are a legal obligation imposed by a court decree or by a written agreement incident to a decree."

The official Report of Hearings before the Senate Finance Committee on the 1954 Code, pp. 1, 8, quotes the technical staff of the Joint Committee on Internal Revenue Taxation as repeating the above quoted sentence verbatim in a report submitted to the Senate Finance Committee on *April 7, 1954*. The Report of the Senate Finance Committee (Sen. Rep. No. 1622, 83rd Cong., 2d Sess., p. 10) published *June 18, 1954* repeats the same sentence. And by an extraordinary coincidence, the same sentence is found in the Report of the Section of Taxation of the American Bar Association, submitted at a hearing before the Senate on *April 8, 1954* by the Chairman of the Section, the eminent tax expert Thomas N. Tarleau, Esq., who had argued for Mr. Newton before the Second Circuit Court of Appeals on March 11, 1954. Hearings before the Committee on Finance, United States Senate Eighty-Third Congress, 2d Sess. on H. R. 8300, p. 483.

In order to sustain her position, the taxpayer need only show that there was a reasonable doubt whether "divorce" in the statute meant "decree" or "status" of divorce; if so, the interpretation adopted by the Congressional Committees and the Treasury Regulations must prevail. It would seem almost self-evident from the number of court decisions which reached the same conclusion (pp. 16-20, *infra*) without reliance on the administrative practice or legislative history that this thesis was at least an arguable one, particularly as the Second Circuit Court of Appeals itself expressed the same view in an elaborate dictum in 1948, six years after the alimony change was enacted (*Smith* v. *Commissioner*, 168 Fed. 2d 445). However, we submit that for certain reasons not called to the Court's attention in *Newton*, the Treasury's interpretation of the statute was in fact probably the only permissible one.

This interpretation accords with the meaning attached to the word "divorce" in contemporary authorities. A careful reading of the article "Divorce" in 27 Corpus Juris Secundum, copyrighted in 1941, the year before the statute in question was passed, reveals that in the 785 pages of this article, where "divorce" is referred to thousands of times, there is not a single instance in which the word is used in the sense of "divorce status." Where the latter thought is expressed, the phraseology used is always "the status of a single person." See 27 C. J. S., "Divorce", Sections 167 and 327.

It is probably correct to say, indeed, that the expression "status of divorce" is a legal solecism. There is a marital status, and a single status, both of which are continuing. Properly speaking, divorce terminates

the status of marriage and restores the status of singleness. See Corpus Juris Secundum, *supra*.

The confusion inherent in the supposed "status of divorce" is sufficiently shown in *Newton v. Pedrick*, *supra*, where it is apparently applied to Mrs. Heath's status even after her re-marriage. As the Court may infer from Mr. Newton's active promotion of his divorce, he had also remarried, long before Mrs. Heath. Assuming that a "status of divorce" might properly describe two former spouses divorced and still single, one might question whether such status survived the remarriage of one, and it certainly seems unreasonable that it should survive the remarriage of both.

The Century Dictionary (1911 ed.) thus defines "divorce":

> "1. A legal dissolution of the bond of marriage. *In its strictest application the term means a judicial decree* or legislative act absolutely terminating or nullifying a marriage * * *; and it is sometimes also used more broadly still of a *judicial decree* that a supposed marriage never had a valid existence * * *.
>
> "Hence—2. Complete separation; absolute disjunction; abrogation of any close relation; as, to make *divorce* between soul and body; the *divorce* of church and state. * * *
>
> "3. *That sentence or writing by which marriage is dissolved.*" (Emphasis supplied)

The definition in Funk & Wagnall's New Standard Dictionary of the English Language (1935) is:

> "1. (1) *Law. Legal dissolution of a marriage contract.* (2) Any separation of man and wife according to the accepted customs of their domicile, as among uncivilized tribes. 2. A decree of nullity of marriage * * *. 3. Hence, the forcible severance of any close relation. 4. A *judgment or decree dissolving a marriage.*" (Emphasis supplied)

Bouvier's Law Dictionary (8th Ed.) defines divorce as "the dissolution or partial suspension, by law, of the marriage relation"; Black's Law Dictionary (4th Ed.) defines it as "The legal separation of man and wife, for cause, by the judgment of a court * * * the former divorce (a vinculo) puts an end to the marriage." The word as last used can only mean the decree. The article on divorce in the Encyclopedia Britannica, 14th Ed.,—a publication which has been recently cited as an authority on verbal usage in *Dragon Cement Co. Inc.* v. *U. S.* (C. A. 1) 224 F. 2d 514, cert. denied Oct. 14, 1957—which was published a few years before the enactment of the 1942 Revenue Act, like Corpus Juris Secundum, uses "divorce" only in the sense of the decree of dissolution, and never in the sense of a continuing status.

The first case in which the question arose whether the words "incident to such divorce" should be construed to mean "incident to such divorce decree" or "incident to the status of divorce" was *Daugalter*, 9 T. C. 580, decided without dissent by the Tax Court in 1947 in favor of the former construction. The

Court evidently regarded the case as too plain to require the support of administrative practice; at least it made no reference to Regulations 111. This case was followed in several later Tax Court decisions, two of which were affirmed by the Courts of Appeals—*Cox* v. *Comm.*, *supra* and *Comm.* v. *Walsh*, *supra*.

In 1949, in *Comm.* v. *Murray* (C. A. 2) 174 F. 2d 816, apparently for the first time, the question was raised by way of a casual dictum whether the above interpretation was correct. There Judge Learned Hand remarked:

> "As a new question we are not prepared to say that the phrase 'a written instrument incident to such divorce or separation' should be read as 'incident to such divorce or separation decree.' However, the Tax Court had already held that it should be (citing *Daugalter*, *supra*); we will accept that reading for the purposes of this appeal; and it follows that any payments made by the husband in 1943 under the contract of 1938 were not in discharge of any 'legal obligation * * * imposed * * * under a written instrument incident to' a 'divorce.'"

Evidently the provisions of Regulations 111 had not been called to his attention, but even without taking them into account the Court was willing to follow the rule as already established.

Judge Hand's opinion was commented on in *Terrell* v. *Commissioner* (C. A. 7) 179 F. 2d 838, cert. denied 340 U. S. 822, in which payments made by the husband pursuant to a court order entered in a suit by

the wife to recover payments under a separation agreement were held not deductible where there was no decree of divorce or separation. The Court said (841, 842):

> "In our opinion *Commissioner* v. *Murray*, 174 Fed. (2) 816 does not alter the holding in the *Smith* case. As a matter of fact, in the *Murray* case the court assumed that *the statute required that the written instrument must be incident to a divorce or separate maintenance decree*, as held in *Smith v. Commissioner*.
>
> * * * * *
>
> "Thus, it seems clear that a court order or decree entered to enforce an agreement or contract of separation made by husband and wife is not sufficient in itself to bring a case within the terms of Section 23 (u), there must be a decree of divorce or separation and *the obligation of payment by the taxpayer must be imposed under that decree or under a written instrument incident to the decree of divorce or separation*. In the case at bar there is no such decree." (emphasis supplied)

The editorial comment in 4 American Law Reports Annotated (Second Series), published in 1949, states at page 259:

> "The written instrument must be 'incident to' the decree of divorce or separation in order that payments required by the instrument and not referred to in the decree may be considered income to the wife under Par. 22 (k)."

One or two subsequent cases by way of dictum refer to a possible "status" interpretation, but it was not until April 28, 1954, twelve years after the statute was passed, and after many cases had been decided (and undoubtedly thousands determined) upon the basis of the construction confirmed by Treasury Regulations, that the Court in the *Newton* case, overruling the District Court, held for the first time that additional payments made by a husband to a wife pursuant to a private agreement entered into six years after divorce, and several years after they had both remarried, were taxable to the wife, because while concededly not incident to their divorce decree, it was incident to their "status of divorce." The Court added a dictum that its decision "does not mean that a written agreement fixing support and payments entered into *for the first time* after a decree of divorce or separation would necessarily fall within the statute;" it left this question open, despite the fact that it also had been uniformly decided adversely to the husband, in accord with Treasury Regulations, throughout all the prior years.

The *Newton* opinion stated (212 F. 2d 360): "The courts have had difficulty with the proper interpretation of this clause ever since the enactment of the statute." But the courts were uniform in their interpretation of the point raised in the *Newton* case from 1942 to 1954.

Congress shortly after the *Newton* decision included in the 1954 Code a provision which gave private written agreements between separated or divorced parties the same status as court decrees. However, the Congress wisely further provided that the new rule

should only apply to agreements entered into after the new statute took effect. The probable basis for the new statutory provision was that the income-splitting provisions of the 1948 Revenue Act largely removed the danger of tax-avoiding private separation agreements,—a danger which no doubt was one reason why the 1942 Act declined to recognize such private income readjustments.

Of course, the 1954 amendment has no bearing on the proper interpretation of the 1942 Act. However, its purely prospective effect strongly emphasizes the advantage of legislative amendment of tax statutes as opposed to judicial interpretation, which is automatically retroactive, and hence likely to lead to such injustice as is threatened against the petitioner here, who is faced with additional taxes and interest as far back as 1943, as a result of making her returns in reliance on the clear and explicit provisions of the Treasury's own Regulations in force throughout the whole intermediate period.

As showing the confusion arising from the *Newton* decision and its confirmation in the instant case, two recent decisions of the Ninth Circuit Court of Appeals afford good examples. In the first, *Tressler v. Commissioner* (1955) 228 F. 2d 356, 360, the Court said:

> "The payments here involved were not paid in discharge of an obligation imposed under a decree of divorce or under a written instrument *incident to a decree of divorce* or separate maintenance." (Emphasis supplied)

In the second, *Hollander* v. *Commissioner* (1957) 248 F. 2d 523, the Court cited the *Newton* case with approval, but specifically grounded its judgment on the fact that the subsequent agreement (there ratified by the California court of both parties' current domicile) was made before the wife's remarriage (p. 527).

A very recent announcement of Internal Revenue Service, Technical Information Release No. 161, June 2, 1959, 595 CCH ¶6521, indicates further confusion arising from these decisions. The Service announced that it will follow *Newton* and *Hollander*, and refers to the present case. It states (erroneously, we believe) that "the alimony payments were made in discharge of the legal obligation to support the wife." That may have been true in *Hollander*, but certainly was not in *Newton*, where the added payments were assumed by the husband *after his wife's remarriage*. The Service in conclusion cryptically "emphasized in addition it does not agree with these court opinions to the extent that they purport to allow a deduction to the husband for payments made to his former wife for any reason other than 'because of the family or marital relationship in recognition of the general obligation to support,' as required under applicable regulations." This conclusion would seem directly opposed to *Newton*, when the reason for the husband's agreement was admittedly to obtain sole custody of the children.

While the *Newton* decision recognizes that the 1942 Act specifically disclaimed any change in the treatment of payments for minor children's support, it does not seem to have discerned the effect of this legislative intention upon the meaning of the words

"a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband." We submit that the quoted words must refer solely to the legal obligation of the husband to support his wife, and can have no relation whatever to his obligation to support his minor children, and still less to provisions as to their custody. Even if the French Court were considered to have retained jurisdiction to require Mr. Newton to pay alimony, after a decree of absolute divorce which contained no such provision, neither the French Court nor any American Court could possibly have entertained such an idea in 1930, when the petitioner was married to Mr. Heath. This was not such a case, then, as this Court referred to in *Lerner* v. *Comm.*, *supra* (the decision said to have foreshadowed *Newton* v. *Pedrick*, *supra*, though the point decided was quite different) as one where the husband should not be deprived of 22 (k) relief "when merely legal formalities have not been rendered their full due," such as the incorporation of an earlier separation agreement in the divorce decree. Here there was no mere technical omission; at the time when the 1930 property agreement was made the whole legal foundation for the award of additional alimony to the petitioner had long since been swept away by her remarriage.

The line of cases represented by *Lerner* v. *Comm.*, *supra*, *Izrastzoff* v. *Comm.* (C. A. 2) 193 F. 2d 625, *Feinberg* v. *Comm.* (C. A. 3) 198 F. 2d 260, and *Miller* v. *Comm.* (C. A. 9) 199 F. 2d 597, deal with an entirely different problem,—the effect of Section 22 (k) on private agreements made before a divorce. *Cf.* the quotation from the opinion of the Ninth Circuit Court of Appeals in *Tressler* v. *Comm.*, at page 20, *supra*.

The fact that prior to 1954 the possible contrary interpretation was never more than casually suggested in any opinion perhaps explains why no careful analysis was made in *Newton* of the legislative or administrative history.

In view of the uniform administrative construction of Section 22 (k) in Regulations 111, the 1946 Supplement, and Regulations 118, the clearly expressed views of the Congressional Committees to the same effect, and the unanimity of judicial construction during all the tax years here in question and for many years afterwards, it would seem unjust to subject this petitioner to a highly subtle *ex post facto* interpretation arrived at for the first time in 1954.

POINT II

This important question should be determined by this Court.

The importance of this question may be measured by the number of cases in which it has been litigated, and further by the fact that seventeen years after the pertinent statute was enacted, confusion is apparently worse than ever, as exemplified by Technical Information Release No. 161, *supra*, just released by the Internal Revenue Service.

This Court should intervene to prevent the Treasury Department from repudiating its own Regulations of so many years' standing, which as now appears beyond dispute were drawn in exact accordance with Con-

gressional intent, and from penalizing this taxpayer and others similarly situated for their reliance on its own explicit representations.

CONCLUSION

It is respectfully submitted that a writ of certiorari should be granted.

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